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No. 98-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Petitioner,

v.

MICHAEL GIBSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of over 3,000 attorneys who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants for employment on claims arising out of the workplace. NELA has participated as *amicus curiae* in numerous employment cases before the state and federal appellate courts as well as the United States Supreme Court. Recent cases before this court include *Kolstad v. American Dental Association*, No. 98-208 (S.Ct., October Term, 1998); *Haddle v. Garrison*, No. 97-1472, 67 U.S.L.W. 4029 (U.S. Dec. 14, 1998); *Wright v. Universal Maritime Corp.*, ___ U.S. ___, 119 S.Ct. 391 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998); *Oubre v. Entergy Operations, Inc.*, 520 U.S. 1185, 117 S.Ct. 1466 (1997).

NELA has a compelling interest in ensuring that the goals of Title VII of the Civil Rights Act of 1964, as amended, are fully realized. Because the awarding of compensatory damages is critically important to the full enforcement of the statute for federal employees, NELA submits this brief to protect the interests of its mem-

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[1] Petitioner and Respondent have consented to the filing of this brief *amicus curiae*. The consents have been filed with the Clerk of this Court. No part of the attached brief has been authored by counsel for either party. No persons other than the *amicus curiae*, its members or their counsel made a monetary contribution to the preparation and submission of this brief.

bers' clients by ensuring that compensatory damages are available in the administrative EEO process under the standards established by the United States Congress.

SUMMARY OF THE ARGUMENT

This case presents the Court with an opportunity to clarify whether compensatory damages are available to federal employees during the administrative process under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* *Amicus* proposes that the Court reject the position of the Seventh Circuit Court of Appeals permitting compensatory damages only after a jury trial. Such a requirement, which prohibits the Equal Employment Opportunity Commission from continuing to award compensatory damages, is not in accord with the remedial purpose Congress intended when it amended the civil rights statutes to permit federal employees to receive compensatory damages. The Seventh Circuit's position is also contrary to Congress' broad delegation of authority to the EEOC to administer the statute and to award appropriate remedies to victims of discrimination. *See* 42 U.S.C. § 2000e-16(c) which authorizes the EEOC to award "appropriate remedies" against federal agencies that violate Title VII; and 42 U.S.C. § 1981a(a)(1) which recognizes that compensatory damages are an appropriate remedy for Title VII violations by federal agencies.

Amicus instead proposes that the Court adopt the rationale enunciated by the Fifth Circuit in *Fitzgerald v. Secretary, U.S. Dept. of Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997), that the EEOC is authorized

to award compensatory damages to federal employees during the administrative process, as it has broad discretion to award appropriate remedies to federal employees pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984):

> Regardless, the text of Title VII's remedial provisions demonstrates that compensatory damages are available in administrative proceedings. First, § 2000e-16(a) is a broad anti-discrimination provision prohibiting discrimination in federal employment. *See id.* § 2000e-16(a). Section 2000e-16(b) grants the EEOC wide-ranging authority to enforce the anti-discrimination provisions of subsection (a) through "appropriate remedies, including reinstatement or hiring of employees with or without back pay." *See id.* § 2000e-16(b). That subsection also directs the EEOC to "effectuate the policies of this section, and . . . issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." . . . When a federal employee suffers harm that may be remedied by compensatory damages, it is certainly necessary and appropriate for the EEOC to grant such relief. Given that the purpose of Title VII is to make injured claimants whole, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 . . . (1975), we do not believe that Congress would have created an administrative process capable of providing only partial relief.

Fitzgerald, supra, at 207.

The adoption of the Seventh Circuit's decision is likely to have a disastrous impact on federal employees

who will encounter more difficulties in obtaining private counsel who will be faced with filing in district court, as well as with the EEOC, for all cases seeking compensatory damages. The lack of compensatory damages in the administrative process will discourage settlements and adversely impact the EEOC's increased emphasis on its alternative dispute resolution (ADR) program. As a result, many more cases will be filed in district courts by federal employee plaintiffs who are seeking compensatory damages as a part of their requested relief. Many, if not most, federal employees seek compensatory damages. The increased workload of the courts will only encourage federal agencies to further delay or refuse to settle cases until they are faced with a jury trial and the possibility of compensatory damages.

Nonetheless, the Seventh Circuit's decision was correct in finding that there was no need to exhaust administrative remedies concerning relief requested in order to receive compensatory damages in court. The purpose of the exhaustion requirement is not served by requiring a federal employee complainant to request the precise relief permitted by the statute when there is no such statutory or regulatory requirement. Because dissatisfied federal employees have the right to petition federal court for a *de novo* review of their claims, they should not be held to a heightened pleading requirement during the administrative process. At the very minimum, the relief should be contingent upon the "particular facts of the case," rather than making the request for relief a mandatory requirement.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THE REMEDIAL PURPOSE CONGRESS INTENDED WHEN IT PERMITTED FEDERAL EMPLOYEES TO RECEIVE COMPENSATORY DAMAGES.

The decision of the Court of Appeals, *Gibson v. Brown*, 137 F.3d 992 (7th Cir. 1998), which effectively requires federal employee victims of discrimination to file in the appropriate United States District Court and succeed in a jury trial before receiving compensatory damages for pain and suffering, nullifies the remedial purpose of the statutory provisions for compensatory damages. Congress added compensatory damages as a remedy available for federal employees in 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, Tit. I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. § 1981a(a)(1)). The Seventh Circuit, in *Gibson v. Brown, supra,* at 996-98, and the Eleventh Circuit in *Crawford v. Babbitt*, 148 F.3d 1318, 1323-26 (11th Cir. 1998), rely on the provision in Title VII allowing for jury trials and the Government's alleged failure to waive sovereign immunity as the bases for finding that the EEOC has no authority to award compensatory damages against federal agencies.

Nevertheless, it is clear that nowhere in Title VII did Congress expressly limit the EEOC's authority to award compensatory damages to federal employees. The Seventh Circuit admitted that Congress had expressly waived the government's sovereign immunity with respect to civil actions for compensatory damages under Title VII and "[n]othing in the statute or regulations explicitly rules out" the EEOC's awarding of compensa-

tory damages. *Gibson v. Brown, supra*, at 995. Furthermore, the court also conceded that "[i]t is not unreasonable to conclude" that the EEOC's statutory mandate to adjudicate Title VII claims against federal agencies "might be broad enough to award compensation for mental anguish and emotional distress." *Id.* In addition, there is no authority cited by the Seventh or Eleventh Circuit which requires Congress to explicitly waive sovereign immunity for the administrative process once it has waived it for the judicial process. The EEOC has maintained since 1992 that it is authorized to award compensatory damage awards against federal agencies where the complainants have claimed and proven such damages at the administrative level.[2]

The court's reliance on the provision for a jury trial before compensatory damages can be awarded is not persuasive. *Gibson v. Brown*, at 996, citing 42 U.S.C. § 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory . . . damages under this section," then "any party may demand a trial by jury." While it is accurate that only a claimant who is a federal employee may seek *de novo* relief in district court and a jury trial, an option which is not open to federal agencies, the Seventh Circuit placed far too much emphasis on depriving federal agencies of the "significant procedural right" to a jury trial on compensatory damages. *Gibson v. Brown, supra*, at 996. Congress recognized that the right to a jury trial primarily benefited

[2] *See Jackson v. United States Postal Service*, EEOC Appeal No. 01923399 (Nov. 12, 1992), slip op. at 407.

federal employees, not federal agencies that were concerned about disproportionately large jury awards.[3]

The statements of the various senators and representatives make it clear that they believed that jury trials advantage victims of discrimination while its provision would operate to the detriment of employers. *Id.* at n. 3. It is likely that Congress could have decided that the EEOC provides sufficient protection to federal agencies against inflated compensatory damages claims. In fact, the EEOC has been hesitant to award large compensatory damage awards, and its highest award is $130,000, as compared to a number of jury awards far in excess of $300,000.[4] In any event, the statutory cap of $300,000 per case, not $1,000,000 as suggested in Respondent's Brief in Opposition (Br. in Opp.) at 9, is also adequate protection against excess awards by the EEOC or district court juries, as punitive damages are not available against "a government, government agency or political subdivision." 42 U.S.C. § 1981a(b)(1).

[3] *See, e.g.*, 137 Cong. Rec. 28,926, 29,022, 030, 041, 053-054; 30,644, 668, 677, 690 (1991).

[4] *Cook v. United States Postal Service*, EEOC Appeal No. 01950027 (Jul. 17, 1998); *see, e.g., Nyman v. Federal Deposit Insurance Corporation*, 967 F.Supp. 1562 (D.D.C. 1997) (judge reduced compensatory damages from $350,000 to $175,000).

II. CONGRESS' CLEAR DESIGN IN TITLE VII TO ENCOURAGE THE RESOLUTION OF EMPLOYMENT DISCRIMINATION COMPLAINTS AGAINST FEDERAL AGENCIES AT THE ADMINISTRATIVE LEVEL WOULD BE UNDERMINED IF THE EEOC DID NOT HAVE AUTHORITY TO AWARD COMPENSATORY DAMAGES, AND A REMOVAL OF THAT AUTHORITY WILL RESULT IN AN INCREASED WORKLOAD FOR THE COURTS.

To limit the availability of compensatory damages to those federal employees who demand jury trials in district courts will adversely affect the requirement to exhaust the administrative EEO process. As noted in *Fitzgerald, supra*, at 207:

> Congress created the EEOC and established procedures so that aggrieved employees could "settle disputes through conference, conciliation, and persuasion" before they are permitted to file lawsuits. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 . . . (1974). If complainants could receive compensatory damages only in district court, they would be encouraged either to "intentionally bypass the administrative process and go straight to district court or perfunctorily go through the administrative process and then seek judicial relief to obtain full relief." *McAdams v. Reno*, 858 F.Supp. 945, 951 (D. Minn. 1994) (finding that compensatory damages are available in administrative proceedings), *aff'd on other grounds*, 64 F.3d 1137 (8th Cir. 1995).

The Seventh Circuit's decision is bound to have a significant impact on EEOC administrative practice as federal employees will insist upon subsequently filing in district court to obtain compensatory damages. This dual processing of Title VII complaints required to obtain full relief is likely to further complicate and lengthen the proceedings. Legal representation will be limited to those federal employees with sufficient resources to obtain private counsel or those whose cases have the promise of substantial relief. It is also well established that "Title VII claimants . . . often proceed *pro se* during the administrative investigation." *Fitzgerald v. Secretary, supra*, at 208. *Pro se* complainants will be especially affected, as it is bound to be more difficult to obtain competent counsel to take less significant cases to district court.

However, respondent contends that it will not be necessary to go to district court to obtain compensatory damages:

> . . . nothing in *Gibson* prohibits the EEOC or federal agencies from voluntarily offering compensatory damages to complainants in settlement, or as offers of full relief. The *Gibson* decision only prevents the EEOC from ordering compensatory damages where federal agencies would be deprived of the right to trial by jury. To the extent that the government desires to reduce congestion in the federal courts, it will be motivated to make fair settlement offers to victims of discrimination, including offers of compensatory damages.

Br. in Opp. at 9; *see also Crawford v. Babbitt, supra*, at 1326. Respondent's position is based on the rather questionable premise that federal agencies will waive their statutory rights and voluntarily offer to pay compensatory damages to "reduce congestion in the federal courts." It is highly unlikely that federal agencies in this era of tight budgets will offer any more relief than

is necessary or than would be required to avoid the risk of greater damages. Removing compensatory damages from the EEOC's arsenal of possible relief will only encourage federal agencies not to settle cases until after they have actually been filed in federal court where damages may be awarded, thus further clogging already congested court dockets. Further, it will preclude federal employees, who are unable or unwilling to file in district court, from effectively seeking compensatory damages and thus coerce that group into accepting less during settlement negotiations than to which they might otherwise be entitled.

Moreover, individual federal agencies, who will be represented by the Department of Justice in federal court, are not concerned about the courts' workload. If anything, the longer delays encountered by plaintiff-employees will work to the agency's benefit as any adverse awards will be further postponed. In addition, all court awards and court-approved settlements of compensatory damages come out of the General Accounting Office's Judgment Fund, rather than each agency's appropriation, thus providing another disincentive for federal agencies to settle at the administrative stage where the agencies are financially responsible for an adverse award. The respondent's conclusion that "the federal district courts will not be inundated with federal EEO claims" is a very unlikely scenario. Br. in Opp. at 9. In actuality, the federal district courts' dockets are already overloaded, and a new rush of federal EEO claims will only exacerbate the situation.

In addition, the removal of the EEOC's authority to award compensatory damages is likely to have a dis-

astrous impact on its ADR program which recently has been receiving more emphasis, including commentary by EEOC Chairwoman Ida Castro at the Commission's February 11, 1999, briefing (where the initiative for the project was announced). Bureau of National Affairs, *Employment Discrimination Report* 217 (Feb. 17, 1999). Only federal employees who do not seek compensatory damages, or those who are willing to give them up, will have any incentive to settle. Furthermore, as noted *supra*, there will be less incentive for federal agencies to settle. In the proposed rules for amendments to 29 C.F.R. § 1614, 63 Fed. Reg. 8594, 1998 WL 66453, issued February 20, 1998, the EEOC states that:

> The Commission proposes to amend section 1614.102 to require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO pre-complaint process. The required pre-complaint ADR program would be in addition to the provisions in the current regulation that encourage the use of ADR at all stages of the complaint process. Agencies would be free to develop the programs that best suit their particular needs. While many agencies have adopted the mediation model as their ADR initiative, other resolution techniques would be acceptable, provided that they conform to the core principles set forth in Management Directive 110. Although ADR is believed to be most effective at the early stages of a dispute, agencies may continue their ADR efforts at any stage in the process, including after the formal complaint has been filed. An effective ADR program will serve both goals set out by the Commission. By resolving complaints early on, ADR will make the process more effi-

> cient. ADR will also serve to make the process fairer, by giving complainants an alternative to the counseling process that has been criticized by agency officials and employee representatives.

63 Fed. Reg. 8595.

The Commission also plans to enhance ADR by allowing attorney fees to be awarded for work done in the counseling period, including any ADR process, in proposed § 1614.501(e)(1)(v). 63 Fed. Reg. 8602, 8605. The inability of the EEOC to award compensatory damages is also likely to adversely impact its planned provision for offers of resolution, which allow an agency to make an offer at least 30 days prior to a hearing. *See* 63 Fed. Reg. 8603. Without the possibility of compensatory damages, agencies will have less incentive to make substantial offers of resolution.

Once compensatory damages are eliminated as part of the exhaustion requirement under 42 U.S.C. § 2000e-16(c), the administrative process will more than likely become an obstacle to settlement, rather than a method of resolving problems and reducing the workload of the federal courts. *See McKart v. United States,* 395 U.S. 185, 195 (1969) (pointing out that the administrative exhaustion requirements serve a "very practical notion of judicial efficiency," because the courts may never have to intervene if a complainant is "successful in vindicating his rights in the administrative process."). The EEOC is likely to have a similar situation as in its private sector program which usually serves as a way station to court. This will undermine the entire thrust of the EEOC's proposed rulemaking, which is to improve the ". . . effectiveness of the EEOC in enforcing the statutes that prohibit workplace discrimination in the federal government . . . ." 63 Fed. Reg. 8594.

According to the latest EEOC report, there were 26,140 administrative complaints filed against federal agencies in fiscal year 1996 which include Title VII, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. *See Federal Sector Report of EEO Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1996* at 1. While the majority of these claims are resolved at the administrative (EEOC) level, this trend is likely to be reversed as agencies become less likely to offer compensatory damages. In fiscal year (FY) 1996, the EEOC closed 4,357 appeals of cases under Title VII, which often included compensatory damages as relief where discrimination was found. *Id.* at 74. During FY 1996, federal agencies awarded compensatory damages in the amount of $4,994,135.40 in complaints closed with corrective action. *Id.* at 46; *see also, e.g., Turner v. Babbitt,* EEOC Appeal No. 1956390 (Apr. 27, 1998), 1998 WL 223578, at *5-6 (which cites recent cases where the EEOC awarded compensatory damages). As noted in the Petition for Writ of Certiorari (Pet. Br.):

> If the EEOC does not have the authority to award compensatory damages against federal agencies, as the Seventh Circuit held, many such cases could not be closed at the administrative level and instead would reach the federal courts. And if, as the rationale of the Seventh Circuit's decision might suggest, federal agencies likewise cannot award compensatory damages at the first stage of the administrative

process, the burden on the federal courts would still be greater.

Id. at 13-14.

The Seventh Circuit's decision will also prohibit the Merit Systems Protection Board ("MSPB") and arbitrators from awarding compensatory damages. The MSPB has been awarding compensatory damages in "mixed cases" which involve serious personnel actions where the federal employee asserts an affirmative defense of discrimination, based on the EEOC's decision in *Jackson, supra*. *See Hocker v. Department of Transportation*, 63 M.S.P.R. 497, 505 (1994), *aff'd*, 64 F.3d 676 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1116 (1996). Arbitrators, who interpret collective bargaining agreements and decide both mixed cases and other cases where discrimination is alleged, are bound to follow the MSPB's substantive case law in adverse action cases. *Cornelius v. Nutt*, 472 U.S. 648, 105 S.Ct. 2882 (1985). The inability of the MSPB and arbitrators to award compensatory damages is also likely to affect the settlement of these difficult cases and will increase their chances of also ending up in the federal courts simply on the issue of damages. *See* 5 U.S.C. § 7703(b)(2); 7121.

III. THE DECISION OF THE COURT OF APPEALS BELOW WAS CORRECT IN FINDING THAT THERE WAS NO NEED TO EXHAUST ADMINISTRATIVE REMEDIES CONCERNING RELIEF REQUESTED IN ORDER TO RECEIVE COMPENSATORY DAMAGES IN COURT.

The Seventh Circuit found that petitioner did not exhaust his administrative remedies in regard to compensatory damages because he failed to put the EEOC

on notice that he was requesting such damages. However, the court below found that failure to exhaust was irrelevant because it would have been futile. *Gibson* at 994-995. There is no dispute that the exhaustion requirement is important and "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Gibson* at 995, *citing McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). However, the purpose of the exhaustion requirement is not served by requiring a federal employee to request the precise relief permitted by the statute, as opposed to requiring him to timely file his claim with his agency and/or the EEOC.

According to the Seventh Circuit, the district court below found that ". . . even if it interpreted the new claim as one seeking only relief (as we interpret it), *viz.* compensatory damages, the same rule of exhaustion would apply and require its dismissal." *Gibson* at 994. However, the district court specifically stated that "[t]he Court's review of all the objective evidence indicates that Gibson never asserted facts which would reasonably lead to compensatory damages during the administrative processing of his complaint." *Gibson v. Brown*, No. 96 C 223 (N.D. Ill. Oct. 3, 1996) (*cert.* petition at 23a, n. 2). Moreover, there is a substantial difference between holding federal employees to the administrative exhaustion requirement and requiring that they precisely state the relief requested under the amendments to Title VII. Because dissatisfied federal employees have the right to petition federal court for a *de novo* review of their claims, they should not be held accountable to a heightened pleading requirement during the administrative process. In fact, it is already

established that the remedy a successful claimant is entitled to flows from the claim asserted and may be amended at any time during the administrative process without restriction, including after receipt of an agency's certified offer of full relief and prior to hearing. *Carlson v. Secretary of the Navy*, EEOC Request No. 0590480 (Apr. 16, 1994); *Sloan v. U.S. Postal Service*, EEOC No. 03940166 (Feb. 9, 1995).

Once a case is already destined to be filed in federal court, permitting federal employees to amplify their claims in federal court to seek compensatory damages will not overly burden the courts. As most cases appear to be resolved prior to federal court, this should have little effect if the EEOC is determined to have authority to award compensatory damages. Only those complainants who are still unable to resolve their claims during the administrative process will be filing in federal court. It would also be inequitable to hold *pro se* federal employees to the same standard that represented employees are expected to follow. Furthermore, all federal employees, whether represented or *pro se*, already run the risk of having their administrative claims dismissed because of failure to accept an agency's offer of full relief without compensatory damages if they neglected to request compensatory damages during the administrative process. *See* 29 C.F.R. § 1614.107(h); *Fitzgerald, supra,* at 208-09.

In any event, the EEOC regulation which covers the filing of complaints only requires specific information as to the identities of the parties but is silent as to requests for relief. 29 C.F.R. § 1614.106. As correctly noted by Respondent:

> And the regulations charge both the employing agency and the EEOC with a duty to afford victims of discrimination "full relief," regardless of what the complainant writes in the "corrective action" box on the initial EEO complaint form. See 29 C.F.R. § 1614.501 and Appendix A to Part 1613.

Br. in Opp. at 5-6.

The Fifth Circuit also has struggled with this issue and still did not unequivocally state that it was necessary to state with specificity the relief requested in the administrative complaint:

> We note that the employee need not present his claim for compensatory damages in a legal or technical manner. He must, however, inform the employing agency or the EEOC of the *particular facts of the case* that demonstrate that he has suffered an emotional and/or mental injury that requires the payment of compensatory damages to make him whole. Such facts obviously must demonstrate more than the mere fact of forbidden discrimination or harassment. . . .

Fitzgerald, supra, at 208; *see also Barnett v. Secretary of the Treasury*, EEOC Appeal No. 01943513 (Feb. 15, 1995) (complainant not required to specifically request compensatory damages as relief, but sufficient that factual allegations in complaint put agency on notice concerning harm suffered). At the very minimum, this appears to be a reasonable middle-of-the-road position which makes relief contingent upon the "particular facts of the case," rather than making the request for relief a mandatory requirement.

CONCLUSION

For the foregoing reasons stated in this brief, *Amicus* asks this Court to reverse the opinion of the lower court to allow the EEOC to award compensatory damages. However, this Court should uphold the decision below in regard to waiving the exhaustion requirement for the relief requested.

Respectfully submitted,

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